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4 REARDEN LLC, et al.,  
5 Plaintiffs,  
6 v.  
7 THE WALT DISNEY COMPANY, et al.,  
8 Defendants.  
9

10 Case No. 17-cv-04006-JST  
11

12 **ORDER GRANTING MOTION TO  
13 EXCLUDE TESTIMONY OF CINDY  
14 IEVERS**

15 Re: ECF No. 424  
16

17 Before the Court is Defendants' motion to exclude the testimony of Cindy Ivers. ECF  
18 No. 424. The Court will grant the motion.

19 **I. BACKGROUND**

20 The factual and procedural background of this case are summarized in greater detail in this  
21 Court's prior orders. ECF Nos. 60, 85, 297. In short, this case concerns claims for contributory  
22 copyright infringement, vicarious copyright infringement, and trademark infringement by  
23 Plaintiffs Rearden LLC and MOVA LLC (collectively, "Rearden") against Defendants The Walt  
24 Disney Company; Walt Disney Motion Pictures Group, Inc.; Walt Disney Pictures; Buena Vista  
25 Home Entertainment, Inc.; Marvel Studios LLC; Mandeville Films, Inc.; Infinity Productions  
26 LLC; and Assembled Productions II LLC (collectively, "Disney"). Rearden alleges that Digital  
27 Domain 3.0 ("DD3") directly infringed Rearden's copyright to Rearden's MOVA Contour Reality  
28 Capture ("MOVA")—a program for capturing the human face to create computer graphics ("CG")  
characters in motion pictures. Rearden further alleges that Disney "contracted with DD3 to  
provide facial performance capture services using the copyrighted . . . program" to create the  
character Beast in its film *Beauty and the Beast* (2017). ECF No. 315 ¶ 117.

Disney has moved for summary judgment on all of Rearden's claims in connection with

1        *Beauty and the Beast.* ECF No. 421. In opposition to Disney's motion, Rearden relies on the  
2 expert report and testimony of Cindy Ievers—Rearden LLC's Vice President of Finance. Ms.  
3 Ievers' report and testimony pertain to the actual damages suffered by Rearden as a result of  
4 Disney's alleged infringement. Disney seeks to exclude Ms. Ievers' testimony.

5        **II.     LEGAL STANDARD**

6        The proponent of expert testimony "has the burden of proving admissibility." *Lust ex rel.*  
7        *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). Under Rule 702 of the  
8 Federal Rules of Evidence:

9        A witness who is qualified as an expert by knowledge, skill,  
10      experience, training, or education may testify in the form of an  
opinion or otherwise if:

11      (a) the expert's scientific, technical, or other specialized knowledge  
12      will help the trier of fact to understand the evidence or to  
determine a fact in issue;

13      (b) the testimony is based on sufficient facts or data;

14      (c) the testimony is the product of reliable principles and methods;  
15      and

16      (d) the expert has reliably applied the principles and methods to the  
facts of the case.

17      Following *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), trial courts serve  
18      a "gatekeeping" role "to ensure the reliability and relevancy of expert testimony." *Kumho Tire*  
19      *Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

20      "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection  
21      to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the  
knowledge and experience of the relevant discipline." *Alaska Rent-A-Car, Inc. v. Avis Budget*  
22      *Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) (quoting *Primiano v. Cook*, 598 F.3d 558, 565 (9th  
23      Cir. 2010)). The question "is not the correctness of the expert's conclusions but the soundness of  
24      his methodology." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995).  
25      Thus, courts should "screen the jury from unreliable nonsense opinions, but not exclude opinions  
26      merely because they are impeachable." *Alaska Rent-A-Car*, 738 F.3d at 969. "Shaky but  
27      admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the

1 burden of proof, not exclusion.” *Primiano*, 598 F.3d at 564.

### 2 **III. DISCUSSION**

3 “Actual damages” are the extent to which the market value of a copyrighted work has  
4 been injured or destroyed by an infringement.” *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087  
5 (9th Cir. 2014) (quoting *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512  
6 (9th Cir. 1985)). The “test of market value” is “what a willing buyer would have reasonably been  
7 required to pay to a willing seller for plaintiffs’ work.” *Frank Music Corp.*, 772 F.2d at 512  
8 (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1174  
9 (9th Cir. 1977), overruled on other grounds, *Skidmore as Trustee for Randy Craig Wolfe Trust v.*  
10 *Led Zeppelin* 952 F.3d 1051 (9th Cir. 2020)). “Excessively speculative claims of damages are to  
11 be rejected, and the ‘market value approach is an objective, not a speculative, analysis.’” *Jarvis v.*  
12 *K2 Inc.*, 486 F.3d 526, 534 (9th Cir. 2007) (citation omitted) (quoting *Mackie v. Rieser*, 296 F.3d  
13 909, 917 (9th Cir. 2002).

14 Disney argues that the Court should exclude Ms. Ievers’ testimony as to actual damages  
15 because, *inter alia*, (1) she did not consider what a hypothetical willing buyer would have paid for  
16 Rearden’s services and (2) she fails to estimate the actual damages attributable to the alleged  
17 infringement.

#### 18 **1. Willing Buyer**

19 Disney argues that the Court should exclude Ms. Ievers’s testimony because she did not  
20 assume the existence of a hypothetical willing buyer and, by extension, failed to estimate the fair  
21 market value of Rearden’s services. Rearden argues that Ms. Ievers’s model properly estimates  
22 lost profits.

23 Disney is correct that Ms. Ievers did not purport to consider what a willing buyer would  
24 have paid a hypothetical seller for Rearden’s services. Instead, Ms. Ievers “[quantifies] the sum  
25 that [Rearden] would have charged [Disney] to perform the facial performance capture services  
26 using [MOVA] that [DD3] performed on the *Beauty and the Beast* film.” ECF No. 420-19 at 3.  
27 Throughout her expert report, Ms. Ievers first estimates the costs that Rearden would have  
28 incurred to provide the MOVA services to Disney in the production of the film. ECF No. 420-19

1 at 4–10. Ms. Ievers then adds a “20% markup” profit margin to the cost based on the fact that  
2 MOVA had previously been used in fifteen films at the time that production of *Beauty and the*  
3 *Beast* began, and on the fact that one of those films won an Oscar for Best Visual Effects. *Id.* at  
4 10. On the basis of the cost estimates and 20% markup, Ms. Ievers concludes that \$3.49 million is  
5 what the total that “Rearden would have charged for the MOVA Contour services for [*Beauty and*  
6 *the Beast*].” *Id.* Ms. Ievers’s testimony in her deposition is consistent with the contents of the  
7 report insofar as she couches her analysis only in terms of what Rearden would have charged  
8 Disney for its services. *See* ECF No. 420-18 at 16, 18, 26, 27, 31, 43.

9 Testimony as to what Rearden would have charged will not assist the trier of fact to  
10 determine what a hypothetical willing buyer would have paid for Rearden’s services, which is  
11 essential to the jury’s determination of the fair market value of those services. *See On Davis v.*  
12 *The Gap, Inc.*, 246 F.3d 152, 166 (2d. Cir. 2001) (“The question is not what the owner would have  
13 charged, but rather what is the fair market value.”). Accordingly, Ms. Ievers’s conclusion as to  
14 Rearden’s actual damages is not relevant to the question actually before the jury, and the Court  
15 will exclude her testimony. *See Apple, Inc. v. Samsung Electronics Co.*, No. No. 11-CV-01846–  
16 LHK, 2012 WL 2571332, at \*6 (N.D. Cal. June 30, 2012) (excluding expert testimony  
17 apportioning damages as “unreliable under FRE 702 and *Daubert*” where the calculation of  
18 damages with respect to the infringement claims were “contrary to law”); *United Food and Com.*  
19 *Workers Loc. 1776 & Participating Emps. Health and Welfare Fund v. Teikoku Pharma USA*, 296  
20 F. Supp. 3d 1142, 1183 (N.D. Cal. 2017) (excluding testimony contrary to the legal standard on  
21 the ground that “exclusion of opinions that are irrelevant as a matter of law or contrary to the law  
22 is appropriate through the *Daubert* process.”).

23 Rearden protests that considerations as to what a willing buyer would have paid are  
24 relevant only to actual damages based on a hypothetical model, but not to damages based lost  
25 profits. While Rearden is correct that actual damages “can be awarded in the form of lost profits”  
26 or “hypothetical-license damages,” both forms of actual damages require an assessment of fair  
27 market value. *See Polar Bear Prods, Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004)  
28 (“Actual damages are usually determined by the loss in the fair market value of the copyright,

1 measured by the profits lost due to the infringement or by the value of the use of the copyrighted  
2 work to the infringer.” (quoting *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566  
3 (7th Cir. 2003))). The cases on which Rearden relies are not to the contrary, but rather stand for  
4 the unremarkable proposition that lost profits may be used to determine actual damages. These  
5 cases do not change the outcome of the analysis.

6 **2. Damages Attributable to the Alleged Infringement**

7 As an alternative ground for exclusion, Disney argues that Ms. Ievers fails to differentiate  
8 between the infringing and non-infringing aspects of MOVA’s services. Namely, Rearden alleges  
9 that Disney is vicariously liable for DD3’s direct infringement, and that DD3 infringed Rearden’s  
10 copyright when its computers operated the MOVA software program. ECF No. 315 ¶ 120.  
11 Disney contends that Ms. Ievers’s estimates include compensation for a number of non-infringing  
12 services unrelated to the operation of the software program, such as costs associated with makeup,  
13 travel, and test shoots. Rearden argues that there is “no feasible method to calculate the marginal  
14 profits earned from a MOVA Contour software license” because Rearden never would have  
15 agreed to sell Disney a license to the MOVA code, but Rearden does not challenge Disney’s  
16 argument that the opinion fails to differentiate between the infringing and non-infringing aspects  
17 of MOVA’s services. ECF No. 443 at 15.

18 In addition to the \$3.49 million that Ms. Ievers estimated in lost profits, Ms. Ievers testified  
19 in her deposition and wrote in her rebuttal report that because Rearden was unwilling to license its  
20 software, Rearden would have insisted that Disney purchase MOVA for its enterprise value, which  
21 she estimated to be \$10 million. ECF No. 420-18 at 19; *see* ECF No. 420-21 at 4. But the Ninth  
22 Circuit has explained that the assessment of fair market value is a “hypothetical approach” that  
23 turns on “an objective, not a subjective, analysis” such that Rearden’s “personal objections” to the  
24 licensing of its software are irrelevant. *Mackie*, 296 F.3d at 917. And the assessment turns on the  
25 hypothetical buyer’s “willing[ness] to pay” a hypothetical willing seller “for a use of a plaintiff’s  
26 product work *similar to the defendant’s use.*” *Frank Music Corp.*, 772 F.2d at 513 (emphasis  
27 added). Accordingly, the amount that Rearden would have charged Disney for its services of for  
28 the MOVA enterprise would “t[ell] the jury little of what” profits Rearden lost based on DD3’s

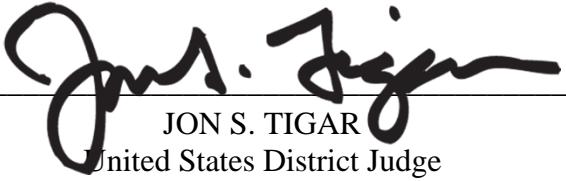
1 “specific use of [Rearden’s] copyrights.” *Oracle Corp.*, 765 F.3d at 1091; *see Wall Data Inc. v.*  
2 *Los Angeles Cnty. Sheriff’s Dept.*, 447 F.3d 769, 786 (9th Cir. 2006) (upholding as a proper  
3 statement of the law jury instructions defining actual damages as the “amount a willing buyer  
4 would have been reasonably required to pay a willing seller at the time of the infringement for the  
5 actual use made . . . of the plaintiff’s [copyrighted] work”). Because Ms. Ivers’s testimony is  
6 also contrary to law for this reason, the Court will also exclude her testimony on this independent  
7 ground.

8 **CONCLUSION**

9 For each of the foregoing reasons, Disney’s motion is granted.

10 **IT IS SO ORDERED.**

11 Dated: October 20, 2023



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12 JON S. TIGAR  
13 United States District Judge